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IN THE

Supreme Court of the United States

October Term, 1966

No. 793

MARK FEIN,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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IN THE

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MARK FEIN,

Appellant,

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the appellee herewith moves to dismiss the appeal in the above-entitled action on the ground that it is not within the jurisdiction of this Court because not taken in conformity to 28 U. S. C. Section 1257(2) and on the ground that it does not present a substantial federal question; or, in the alternative, to affirm the judgment below as fully in accord with all controlling constitutional principles.

Jurisdiction

The appellant, in part, seeks to invoke this Courts' jurisdiction, under 28 U. S. C. Section 1257(2), by contending that former Section 749-aa of the Judiciary Law of the

State of New York was unconstitutional as applied to appellant. However, throughout the proceedings below, appellant contended only that the procedure adopted, i.e., the trial before a panel of special jurors, violated his constitutional rights. [See appellant's brief to the New York Court of Appeals, pp. 81-83; appellant's brief to the New York Supreme Court, Appellate Division—First Department, pp. 183-186; appellant's reply brief to the New York Supreme Court, Appellate Division—First Department, pp. 36-37.]

Never in any court in the State of New York has appellant contended that former Section 749-aa of the Judiciary Law of the State of New York on its face, as construed, or as applied, was invalid under the United States Constitution. Indeed, appellant never mentioned that statute in the appellate courts of New York. That the validity of the provision in question was not challenged in the state court is also evident from the opinion of the New York Court of Appeals which states: "Defendant's contention that the use of a special jury deprived him of his constitutional rights to a fair trial has been considered before and found to be without merit (cits. om.)" (Appendix to Appellant's Jurisdictional Statement, p. 2a).

It is fundamental that where the validity of a statute is not "drawn in question" by an explicit and timely insistence in the state courts that the statute, as applied, is repugnant to the United States Constitution, this Court has no jurisdiction under 28 U. S. C. Section 1257(2) and the appeal must be dismissed. *Ungar* v. *Sarafite,* 376 U. S. 575, 582-3 (1964); *Slagle* v. *Ohio,* 366 U. S. 259 (1961); *Rohr Aircraft Corp.* v. *San Diego County,* 362 U. S. 628

(1960); *Anonymous* v. *Baker*, 360 U. S. 287 (1959); *Hanson* v. *Dinckla*, 357 U. S. 235 (1958); *Wilson* v. *Cook*, 327 U. S. 474 (1946); *Charleston Federal Savings of Loan Assn.* v. *Alderson*, 324 U. S. 182 (1945); *Memphis National Gas Co.* v. *Beeler*, 315 U. S. 649 (1942).

Statement

The appellant was convicted, after trial, in the Supreme Court of the State of New York, County of New York, of the crime of MURDER IN THE SECOND DEGREE (Penal Law of New York, §1046). He was sentenced to State Prison for a minimum term of thirty years and a maximum of life (3885).* Following conviction, but before sentence, the appellant moved for a new trial (24B-26B). Following a hearing that lasted some weeks on certain selected issues, appellant's motion was denied by the trial court in a complete, detailed, and persuasive opinion (3894-3913).

The Appellate Division of the Supreme Court, First Department, unanimously affirmed both the judgment of conviction and the denial of appellant's motion for a new trial [24 App. Div. 2d 32, 263 N. Y. S. 2d 629 (1965)]. That decision was in turn affirmed by the Court of Appeals [per KEATING, J.; FULD, J., dissenting, 18 N. Y. 2d 162, 272 N. Y. S. 2d 629 (1966)]. The opinion of the Appellate Division appears in the certified record (3953-3969). The opinions of the Court of Appeals are appendixed to petitioner's Jurisdictional Statement (1a-14a).

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* Unless otherwise noted, all references are to the page numbers of the Record on Appeal. Where two numbers appear on a page of the Record, the number at the bottom of the page will be used as the reference.

The trial record irresistibly established the appellant's guilt of shooting his bookmaker, one Rubin Markowitz, four times in the head and chest, and while the jury's verdict was challenged by Point XV of appellant's seventeen point brief to the Appellate Division, there was no attack against it in the Court of Appeals. The murder, which occurred in an apartment rented by the appellant under the pseudonym "Weissman", was the bizarre culmination of appellant's sordid double life (503-10, 1445, 1112-16, 1123, 1283, 1137-9). Though surrounded by the indicia of social standing in the community, the proof at trial revealed that the appellant spent considerable time and money in the nether world of assignations, call girls, private parties of perversion, and heavy gambling (*ibid.*). Already deeply in debt, the appellant lost seven thousand dollars betting against the Los Angeles Dodgers in the 1963 World Series (563, 584-7, 1113-14). The appellant thereupon arranged with a friend that he, the appellant, would pay the bookmaker not only the money he lost, but also some $16,690 owed to Markowitz by that friend and another (561-2, 564-6, 571, 577-84). The killing permitted appellant to pocket the cash furnished by his fellow gamblers while writing off his own debt, a coup of almost $24,000 (565-6, 574-5, 577-8, 582, 667-9). Once the deed was completed, however, his composure failed and he sought assistance.

He telephoned his companion and procuress, Carmela Lazarus, a woman of many aliases, whom appellant knew as Gloria Foster (1119, 1133). Mrs. Lazarus responded, with some reluctance, to the appellant's distress signal (1133). Before quitting her apartment, she left a hasty message with another prostitute who remained behind, one Sandra

Ede, and taxied the ten blocks to the appellant's secret lodging (1134).

There the appellant told her that he had shot his bookmaker and pleaded for assistance in disposing of the body, which he had already stuffed into a steamer trunk (1137-9). Responding, Mrs. Lazarus telephoned one David Broudy, who drove over from an adjoining county (881, 961).

Meanwhile, Geraldine Boxer, whose custom it was to meet daily with Mrs. Lazarus for a light supper before each attended their respective evening classes, drove to Mrs. Lazarus' apartment (700-1, 705, 905, 1130, 1132). Miss Boxer was directed by Miss Ede, over the intercom, to the "Weissman" apartment—the murder scene (706, 708-10).

Eventually, Miss Boxer and Mr. Broudy entered the "Weissman" apartment, the latter with the cheap pair of gloves he had been directed to purchase (710-15, 749-50, 882-4, 892, 972-3, 1141). Conceding the presence of the body in the trunk, the appellant responded to Mr. Broudy's questioning by claiming that while he was paying his bookmaker, "somebody burst in * * * shot this man and scooped up the money and left" (893). Assuaging Mr. Broudy's fears about blood leaking from the trunk, the appellant advised that he had lined the bottom with "some canvas bags" (894-5).

The defendant then arranged for the rental of a station-wagon from a nearby concern, and with Mrs. Lazarus he went to pick it up (723-7, 821-6, 829-33, 897-9, 1014-15). By coincidence it was the same vehicle the appellant had rented the previous day—arguably for the purpose of transport-

ing the then newly purchased steamer trunk to the "Weissman" apartment (838-9, 894-5, 1017-18, 1048-9, 1058-9, 1066, 1548-9).

The appellant gave Mr. Broudy the keys to the vehicle and departed, at the insistence of his three helpers, for an evening's dinner engagement (731-2, 904, 1939). The two women accompanied Broudy as he drove about Manhattan looking for a place to dispose of their cargo (737, 908). After a drive of some duration, they stopped by an isolated bank of the Harlem River, and consigned the trunk and its contents to the river (737-9, 801, 908-9, 1155-6).

During the weeks which followed, Mrs. Lazarus and Mr. Broudy responded to appellant's pleas for assistance in attempting to obliterate all evidence that might have associated either him or the crime with the "Weissman" apartment (914-24, 1159-74, 1376). Thus, holes in the floor and wall were concealed with filler and paint, the carpet was first repaired and then destroyed, the furniture and furnishings removed, and the lock changed (*ibid.*). Additionally the appellant told his good friend that "he had gotten rid of the apartment * * * a week or two after the World Series" and in December directed the landlord to terminate the lease (512, 555, 557, 652).

Concurrently with these activities, the appellant had several conferences with the police, two of his own seeking; he was accompanied by counsel (433-5, 1477, 1489, 1492, 1495-6). The appellant's evasions and prevarications to police questioning were foolhardy attempts to mislead both law enforcement officials and, as the judge at the post-trial hearing noted, his lawyer as well (3911, 1495-7, 1500-7, 1511).

Following his conviction, the appellant retained his fourth consecutive attorney, Louis Nizer, Esq., who promptly moved for a new trial, filing affidavits which fill 376 pages of the record, plus exhibits (27B-484B). A hearing was consented to by appellee on the basis of four of the many claims: the failure of the prosecution to advise the defense of the names and stories of Dagmar Finch Generazio, Sandra Ede, Vera McNair and her daughter Yvonne Bennett (486B-493B, 497B-499B, 525B, 2297).

Dagmar Finch Generazio's post-trial story was that Mrs. Lazarus telephoned her before 4:00 p.m. on October 10, 1963, seeking a car to move a heavy box (2547, 2550-1). Since the proof at trial placed the killing after 4:00 p.m., the appellant's argument throughout has been that this is exonerating evidence which the prosecution knew of, suppressed and, indeed, covered by tendering perjurious testimony. Without, at this point, detailing the hundreds of pages of evidence on the subject,* the short answer is that the claim of prosecutorial suppression is absolutely without support, for both appellant's attorney and his investigator testified at the post-trial hearing that they knew Dagmar had been to the District Attorney's Office and knew, while the trial was still in session, that she told of receiving a telephone call from Mrs. Lazarus on October 10, 1963, seeking the loan of an automobile (2914, 2917-19, 2928, 2955, 3003-4, 3018-19).

Sandra Ede's post-trial testimony is confused and contradictory, its substance varying from a denial of being

* For the convenience of the Court, the appellee has lodged with the certified record its brief to the Court of Appeals of the State of New York, which contai s a complete summary of facts.

present in Mrs. Lazarus' apartment when the latter was first called by appellant and a denial of advising Miss Boxer over an apartment intercom of Mrs. Lazarus' whereabouts (3228-30, 3301, 3306), to an assertion that she was "not sure" of what happened on October 10th (3156-7). The latter account, a claimed lack of recollection of the events of October 10th, was the story Miss Ede insisted upon prior to trial (782-3, 3375-8), and repeated before a stenographer (189B-196B) and Miss Boxer (782-3, 786). This insistence of non-involvement, which the prosecutor swore was the only story Miss Ede ever told, was fully disclosed to the defense at the conclusion of the People's case; Miss Ede's name and address were also provided (3375-8, 1746-7).

The post-trial testimony of Mrs. McNair and Mrs. Bennett concerning the source of gunshot sounds also varied markedly from their pre-trial tales (2888-9, 3083, 3126, 3091-2, 3127-8, 2989, 3366-8, 3414, 3370-1, 2388-2393). But whether they believed the shots to have emanated from a direction consistent with the murder site as they advised the prosecutor, or from a source directly opposite as they asserted after trial (in either event, evidence of a most tenuous nature), is less significant than the fact that one of the women, Mrs. Bennett, spoke with appellant's first attorney, Saul Kassow, Esq., about several aspects of the case prior to trial (2981, 2984, 2989). In one of those conversations, to the best of Mr. Kassow's recollection, Mrs. Bennett denied hearing any shots at all (2989).

No Substantial Federal Question is Presented.

(1) The selection of special jurors was not in contravention of appellant's constitutional rights.

The appellant contends that the use of a special jury contravened his constitutional rights. More specifically, he urges that former Section 749-aa of the Judiciary Law of New York is unconstitutional, but as pointed out above (*supra* at p. 2) the question of the validity of that statute has not been preserved for consideration by this Court on appeal. Incorporated in his major contention, however, are the sweeping assertions that the use of special jurors, as applied to him, was so prejudicial as to deprive him of his fundamental rights. Meaningful support for this assertion is lacking. Indeed, the most telling refutation of his thesis comes from the affidavit of his own trial counsel opposing the motion for the special panel:

> "The qualifications of a member of a special panel and that of a member of a regular panel are the same other than the former must entertain a belief in capital punishment while the latter need not.
>
> * * *
>
> "Since ordinary jurors and special panel jurors have the same qualifications, there is no reason for any delay. One question to the assembled panel of ordinary jurors would dispose of any who had conscientious scruples against capital punishment" (174A).

From its inception, the special jury system was subject to frequent attack; but its abolition ultimately occurred in the Legislature [Judiciary Law of New York, former §749-aa, repealed L. 1965, ch. 778, eff. Sept. 1, 1965] not in the courts, where its validity was unfailingly upheld. *Hall* v.

Johnson, 186 U. S. 480 (1901); *Fay* v. *New York,* 332 U. S. 261 (1947); *Moore* v. *New York,* 333 U. S. 565 (1948); *Vanderwyde* v. *Denno,* 113 F. Supp. 918 (S. D. N. Y. 1953), aff'd 210 F. 2d 105 (2d Cir. 1954), *cert. denied* 347 U. S. 949 (1954); *People* v. *Agron,* 10 N. Y. 2d 130, 141 (1961), *cert. denied* 368 U. S. 922 (1961). The Constitution "requires only that the jury be indiscriminately drawn from among those eligible," untrammeled by "purposeful discriminatory exclusion" [*Hoyt* v. *Florida,* 368 U. S. 57, 59, 68 (1957); *Fay* v. *New York, supra* at 284-285]. And, of course, in the case at bar there is a complete omission of evidence suggesting that any discrimination whatsoever occurred. In short, there was no hearing, or request for one, at which an attempt might have been made to obtain the minimal evidence needed to support appellant's present thesis.

Nor was this failure to seek such a hearing a mere oversight. As noted above, appellant's position at trial was that jurors on special panels and regular panels had "identical qualifications" (175A).

(2) Denial of appellant's pre-trial motion for inspection of bullets was not in derogation of the "due process clause"; moreover, no prejudice was, or can be, shown.

While there is no statutory right to pre-trial discovery and inspection in New York, case law has taken cognizance of this right where required by the "exigencies of defense". *People* v. *Golly,* 43 Misc. 2d 122, 123, 250 N. Y. S. 2d 210, 213 (Sup. Ct., N. Y. Co., 1964). See also *United States* v. *Garsson,* 291 F. 2d 646, 649 (S. D. N. Y., 1925) (opinion of

HAND, L., J.). Far from proffering persuasive reasons for examination of the bullets in question prior to trial, the appellant merely stated that they were "pertinent" (36A). Apparently conceding that prejudice must be shown before this issue becomes one of Constitutional magnitude, the appellant erroneously asserts that the denial of his pre-trial motion left him "in no position to assess Haase's [the prosecution's ballistics expert] testimony or to cross-examine him adequately" (Jurisdictional Statement, pp. 27, 50). Not only was Detective Haase cross-examined by the defense—without request for recess to permit further examination of the bullets—but his written reports on the subject were in Court throughout the proceedings pursuant to appellant's subpoena and, as the trial court observed, "were his to utilize as he saw fit" (3904).

Appellant's present claim of prejudice therefore rests solely on his post-trial "tender [of] expert evidence that Haase's testimony had been 'erroneous and misleading'" (Jurisdictional Statement, p. 27). From his analysis of the record, appellant's expert concluded that the jury was misled into believing that "all four bullets were shot from a single firearm" (*ibid.*). But a full reading of the record rebuts any such conclusion. Indeed, when asked "What type of weapon would the bullets have been discharged from?" Detective Haase responded, "They would be capable of being discharged from various rifles or pistols with a right six rifling" (267). It is true that his characterization of "right six rifling[s]" on each of the four missiles conflicts with earlier testimony that only three bullets bore indicia of "right twist rifling" and only one, MD-4, "right six," but this conflict was before the jury.

An analysis of earlier testimony clearly shows that Detective Haase found "six lands and grooves," or a right six rifling on only one bullet (265). Appellant's argument in the state courts that this caused utter confusion can be drawn entirely from the trial record, and was therefore, as the trial court noted, "open for cross-examination. Besides not agreeing with defendant's analysis of the testimony, its proffer is plainly untimely" (3904).

(3) Publicity did not interfere with appellant's right to a fair trial.

Appellant also contends that a "torrent of prejudicial publicity" instigated by the prosecution deprived him of a fair trial (Jurisdictional Statement, p. 51). The record lends no substantiation to this argument.

Despite the publicity that attended the arrest and arraignment of the appellant in the winter of early 1964, there is not one scintilla of proof tending to show that it interfered with his right to an impartial trial. The conflict that sometimes arises between a defendant's right to a fair trial and the Fourth Estate's right to publish is a genuinely troublesome one. But peaceful co-existence—demanded by the Constitution—is impossible when it is claimed, as here, that the mere occurrence of unfavorable publicity strips an accused of his constitutional safeguard.

While appellant now ignores the manner in which he protected himself against preconceived opinions, it is a matter of record that for many months prior to trial he was alert to the problem. He sought and obtained continuances from time to time expressly to postpone trial until the news-

paper accounts would be forgotten (61A). Then, in June, 1964, by habeas corpus petition, appellant moved for an immediate trial, and at the subsequent hearing his counsel referred to the publicity "at the time of arraignment or shortly thereafter, of the fact that it would be impossible then to receive a fair trial. I suppose everybody in this courtroom read the newspapers at that time. But time has passed since then. We are willing to go to trial now" (147A). Nor did he change his position four months later when the trial finally commenced even though the appellant had been free on bail since July of that year (161A-162A, 4-7). Thus, appellant's assertion that he faced the Hobson's choice of immediate trial or indefinite incarceration, while applicable to the June proceedings, no longer applied in October, 1964 (Jurisdictional Statement, p. 52). And yet his position, *vis-à-vis* proceeding to trial, remained unchanged in the autumn.

In addition to the foregoing acknowledgment, it is significant, and the Court of Appeals so observed, that the appellant never moved for a change of venue, the recognized method of avoiding the prejudicial effects of a plethora of local press accounts (Appendix to Jurisdictional Statement, p. 3a). See New York Code of Criminal Procedure, §344 (2).

The defendant cites a number of cases in support of his demand for a new trial on the ground of prejudicial statements *dehors* the courtroom. All stand for materially different propositions than the one he asserts here. Unlike the instant proceeding, in every one of those cases, the defense sought unsuccessfully either a change of venue from

the place where the trial was held or a continuance pending a lull in publicity.

Moreover, in the cases cited, the publicity complained of almost invariably occurred in the non-urban setting of the crime. Near-saturation of the local populace, and thus prospective jurors, was more likely. Where the crime did take place in a metropolitan setting, the proof tendered showed such extensive and bitter radio, television and press coverage that prospective jurors, both grand and petit, were necessarily exposed. Frequently the publicity included "substantial evidence" which in fact was not introduced at trial, such as a confession. In support of their motions for continuance or change of venue, the lawyers there involved offered substantiation for their charge, including polls testing the opinions of local citizenry. *E.g.*, *Sheppard* v. *Maxwell,* 384 U. S. 333, 345-6 (1966). Not only did the appellant by-pass such motions, but to this day, he has offered no support, other than his own statement, that jurors were prematurely partial.

In addition, all too often, in the cited cases, the trial judge gave only the most cursory admonition to the jurors concerning their obligation to avoid reading, or listening to discussions about the case. It is a matter of record that the court below admonished the jury on more than 80 separate occasions "not to look at, listen to or read" anything not received in evidence at trial. Interspersed with these directions were occasional warnings of contempt proceedings against jurors if they failed to obey. *Cf. Sheppard* v. *Maxwell, supra,* at p. 353. In commenting on the trial court's care, defense counsel observed, "I want to thank

your Honor for all the admonitions you have given the jury" (1675).

While the trial was in progress, a column appeared in a local newspaper which defendant deemed unfavorable to his defense. At the appellant's request, the court conducted a special *voir dire*. The result: not a single juror had read the article. *Cf. Sheppard* v. *Maxwell, supra,* at p. 357. Appellant now complains that one trier of fact saw —not read—the article, entitled in big print, "THE FEIN TRIAL."

His present unfounded charge that that juror must have been influenced flies in the face of an expressed representation to the contrary and appellant's acceptance of it at the time. The appellant neither moved to substitute that trier of fact with an alternate, nor suggested a mistrial.

The law should not, and will not, permit reversal where a defendant knowingly accedes to a given procedure for reasons of his own, and then, upon conviction, seeks further litigation upon the allegation that the very procedure he acceded to was error.

In sum, appellant has not shown that an impartial jury could not be, and was not in fact, chosen. See *Palmer* v. *United States,* 340 F. 2d 48, 50 (5th Cir., 1964), *cert. denied* 382 U. S. 903 (1965). His argument is completely devoid of facts showing "that any community prejudice ever existed or in any way affected the deliberations of the jury," the prerequisite he must meet to sustain his charge. *Stroble* v. *California,* 343 U. S. 181, 195 (1952).

(4) There was no violation of appellant's Fourth Amendment rights; indeed, his motion for a hearing was untimely, and his claim knowingly waived.

During the direct examination of appellant's friend, Mr. Tishman, the prosecution offered for identification a chair which had, on the day of the murder, been in the appellant's "Weissman" apartment (588). At that time defense counsel stated:

> "If this furniture purports to be furniture that was in the apartment, Apartment 5B, which is the apartment in question over here; and if that apartment was entered into without a search warrant; or in the alternative, since we have already heard some furniture had been stored in some furniture storage warehouse, if this furniture had been secured from this furniture storage warehouse without the proper legal warrant or proper legal authorization, I object to it; and I shall move to suppress this evidence; and if necessary to hold a hearing if the facts are as I have suggested" (588-9).

It was then agreed, after a conference among counsel, that the chair would be marked for identification so long as the defense was not deemed to have waived its right to "raise the question of a warrantless seizure of this piece of furniture and to raise the question of the legality of the evidence in a motion to suppress later" (593). "Later" arrived in eight days, during the direct examination of Mrs. Lazarus, on November 10, 1964, when the chair was offered in evidence (1192-3). The chair was received over a general objection and, contrary to appellant's statement, without a refusal by the trial judge to conduct a hearing (Jurisdic-

tional Statement, p. 46). There was simply no request for a hearing or *voir dire* to be refused (1193). Subsequently, appellant's attorney noted:

> "Now, if your Honor pleases, I move to strike from the record the introduction of the chair into evidence.
>
> "The Court: Overruled.
>
> "Mr. Kleinman: May I without a discussion about it, call your Honor's attention to a discussion we had at the bench one time a few weeks ago?
>
> "The Court: Yes, I am familiar with that; but under the testimony here, the objection is overruled" (1194).

And this was clearly a proper ruling, for the evidence before the court left no alternative. Mrs. Lazarus had been advised by the appellant to remove all the furniture, including the chair, from the 63rd Street apartment. "Just get rid of it. I don't care what you do with it," he told her (1173). Mrs. Lazarus' solution was to hide the furniture in a warehouse she had dealt with in the past (1173-4, 1193). Contrary to appellant's present observation (Jurisdictional Statement, p. 25), the method of disposal was her own, not "pursuant to appellant's instructions."

From the foregoing, it is beyond serious dispute that the appellant abandoned his title to and possession of the chair when he left it to Mrs. Lazarus to dispose of it as she would. When she placed it in the Century Moving & Storage Warehouse, her feminine reaction against destroying perfectly good property, appellant retained no rights cognizable by the Fourth Amendment which could have been breached by the subsequent acquisition of the property by law enforcement authorities.

Mrs. Lazarus' testimony in this regard was never challenged by the appellant. And the reason for his attorney's perfunctory objection is obvious. Defense counsel initially based his statement on an incomplete understanding of the facts relating to the seizure (588-9). The warrantless search of the warehouse took on an entirely different legal significance when it became clear that the appellant had abandoned the chair. E.g. *Hester* v. *United States,* 265 U. S. 57 (1924); *Abel* v. *United States,* 362 U. S. 217 (1960); *People* v. *Robinson,* 15 N. Y. 2d 559 (1964). The necessary conclusion was that the appellant was in no position to complain for the furniture was no longer his, and, more important, Mrs. Lazarus had the right to turn it over to anyone at all, including law enforcement officers. Indeed, on the day she was finally picked up by the police, she was attempting to change the name of the bailor from Weissman to Williams, an attempt which was solely "her idea" (1643).

Appellant's present chastisement of the trial court for not expressly stating its basis for denying the suppression motion is contrived. The conclusion that appellant draws therefrom, that only with such judicial opinion could Mrs. Lazarus "have been fully cross-examined" (Jurisdictional Statement, p. 46), is astonishing. If he wanted, or needed, the "theory" for the Court's ruling prior to cross examination, he should have asked for it, or made his motion when it ought to have been made—before the trial commenced.

Appellant misstates the law of New York, when he contends that "When a motion to suppress evidence is made during trial, the court shall hold a hearing" (Jurisdictional Statement, p. 45, n. 19). Section 813-d of New York Code

of Criminal Procedure provides that a defendant shall make his motion to suppress only before the trial commences unless he falls within one of several expressed exceptions, none of which applies, or was urged. The People's argument to this effect was never rejected by the state courts nor answered by appellant.

Appellant also claims that certain facts suggesting that the chair was unlawfully seized are "not disputed." Of course they are. But this "dispute" is no longer an issue of concern to the courts. Counsel's failure to seek a hearing to suppress the evidence constitutes a complete and deliberate waiver. There cannot be the slightest doubt that this constitutional point, like so many others, is waivable. This is particularly so where, as here, the appellant was represented by eminent and experienced attorneys who displayed complete familiarity with the liberal and frequently utilized procedures for litigating the issue in the *nisi prius* court. Under the circumstances, it is as fruitless as it is unnecessary to scan the record for probable cause or consent. The issue having been waived, there was no occasion for adducing whatever evidence there might be.

Finally, the appellant has no standing to suppress this evidence. This Court has explicitly stated:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been the victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. *Jones* v. *United States,* 362 U. S. 257, 261 (1960).

See also, *Wong Sun* v. *United States,* 371 U. S. 471, 474 (1963); *Murray* v. *United States,* 333 F. 2d 409, 411-12 (10th Cir. 1964), *cert. denied* 380 U. S. 527 (1964); *Fox* v. *State,* 383 S. W. 2d 25, 28 (1964), *cert. denied sub nom. Thomerson* v. *Tennessee,* 33 L. W. 3294 (1965); *Elkins* v. *United States,* 364 U. S. 206 (1959); *Watson* v. *United States,* 219 F. Supp. 666, 673 (S. D. N. Y., 1963), *cert. denied* 379 U. S. 827 (1964); *United States* v. *Granello,* 243 F. Supp. 325 (S. D. N. Y., 1965); *Shimon* v. *United States,* 352 F.2d 449, 451-2 (D. C. Cir. 1965).

Since he was not the person whose rights were allegedly offended, the appellant cannot be heard to complain that he is the victim of an illegal search of the Century Moving & Storage Warehouse.

(5) The prosecution cannot be cited for an interference with appellant's constitutional rights owing to his failure to examine a report he subpoenaed; in any event, there was no prejudice.

Appellant contends that the prosecutor's failure "to make known to the defense Detective Kelly's ballistics report" violated his constitutional right (although he does not specify upon which Amendment he relies) (Jurisdictional Statement, pp. 23-4, 37-8). He misconstrues the prosecutor's obligation. Detective Kelly's report (150B) was subpoenaed by the defense, at the outset of the trial, and in the physical possession of the court during the trial 13904). Appellant's present speculation that he could not have obtained possession of it unless "the defense specifically requested it" is without substantiation. There were numerous occasions where a general request by defense

counsel brought forth all documents related to a witness' testimony (*e.g.*, 1553-7). As the trial judge noted, the Kelly report was "his to utilize as he saw fit. His choice having been made, he is bound by it" (3904).

Seeking to cover his failure to make use of this report, the appellant charges that the prosecutor had an affirmative obligation to disclose its existence. Of course this is not so.

A case in which the question of "affirmative disclosure" is thoughtfully discussed is *Jordan* v. *Bondy,* 114 F. 2d 599 (D. C. Cir., 1940). There the trial assistant failed to bring to the attention of defense counsel a police departmental record, or "police incidental," which described the suspect as six inches taller than the defendant's actual height. In rejecting defendant's argument that this constituted reversible error, Mr. Justice RUTLEDGE, speaking for the court, observed, at pp. 602-3,

> "In effect they would impose upon the prosecuting officer the duty not only to represent the public, but to represent the accused so far as not only to disclose but to discover evidence which might be considered material to the defense, regardless to some extent of its admissibility, its merely cumulative effect, its equal availability to the accused, and its probable probative effect. Nothing in the Constitution or statutes imposes so broad an obligation.
>
> * * *
>
> "There is nothing to show that the incidental was suppressed. It was a public record, available for public inspection and therefore as much so to appellant and his counsel as to the prosecution. The record does not

> show that appellant's counsel at the trial, now deceased, did not know of its existence or contents, though present counsel of course learned of them later and sought to make use of them as newly discovered evidence. No facts were proved to show any attempt to conceal the existence or contents of the incidental. The most that appears is that they did not call it to the attention of the court or of counsel for the defense."

As the Appellate Division observed, in New York "the true test of what must be disclosed is that of simple fairness" (3966). That there was no violation of this mandate is certain because Detective Kelly's report is evidence of nothing. He probed the hole in the floor of apartment 5-B "for ballistics evidence without results" (150 B). Confirming the plain meaning of this language, he later observed in an affidavit, "This specifically means that I did not find a spent bullet or any fragments which could be identified as coming from a bullet. Due to the condition of the hole I cannot say one way or the other whether the hole in its original state was caused by the entrance of a bullet" (517 B). In other words it was "an inconclusive naked eye examination" (Appendix to Jurisdictional Statement, p. 4a). Following this inspection, the floor boards were sent to the police laboratory. There, Detective O'Brien examined the area through a microscope and discerned "three minute fragments of metallic residue" (1724). This, of course, in no way conflicted with Detective Kelly's inability to discover the same with his naked eye. Rather, it "fully superseded" the Kelly test (Appendix to Jurisdictional Statement, p. 4a).

The defendant does not claim that he was deprived of Detective O'Brien's laboratory report.

Appellant's assertion that "O'Brien merely testified that the wood putty in a hole in the floor board in the apartment contained some metal residue which 'could have been' 'consistent with being part of a bullet'" (Jurisdictional Statement, p. 24), is misleading. He uses this erroneous statement of fact to imply that the three minute fragments may have come from the chemistry of the plastic filler. There is no evidence that the plastic filler contained lead residue. The only recorded testimony on the subject is: "The miscroscopic examination [of the interior of the hole] revealed the presence of plastic filler adhering to the wood constituting the hole itself, and it also revealed the presence of three minute fragments" (1724). These three fragments were then tested; two "were positive for the presence of lead" and "consistent with being part of a bullet (1725-6).

(6) Failure to supply appellant with Dagmar's address in no way deprived him of a fair trial; moreover her tale and her existence were known by the defense.

Appellant contends that "the prosecution's systematic course of suppression" *vis-à-vis* Dagmar Finch Generazio deprived him of a fair trial (Jurisdictional Statement, pp. 18, 40). Dagmar, a prostitute, was the friend whom Mrs. Lazarus allegedly telephoned seeking a car to move a box (2550-1, 2554). When questioned by the police and prosecutor on several occasions, Dagmar fixed the hour of the call variously between 6:00 p.m. and 9:00 p.m., on a day in late September or early October, 1963, recalling that she received it while at Gail Weiner Tracy's apartment (2300-7, 2315-16, 2370-6, 3344-9, 3352, 3357). At the hearing Dagmar testified that the call came between 3:00 and 4:00 p.m.

on October 10, 1963, and that, with but one brief exception, she had repeatedly so advised the prosecution (2547, 2550-1, 2599, 2728, 2805). Both statements were false.

At the latter proceeding, her husband, who was present when Dagmar was first interrogated by the police, corroborated, with some embellishments, that part of her account (2467-9). Gail Weiner Tracy, the girl with whom the then-single Dagmar was living, confirmed that a "week or so" before her October 13th birthday she answered the telephone and the caller, Gloria (Mrs. Lazarus), asked to speak to Dagmar (3523, 3527, 3594, 3683). Mrs. Tracy gave Dagmar the receiver and then heard her say, "no, no, no" into the telephone (3573). Mrs. Tracy noted, with some confusion, that the call came shortly after she took her three o'clock epilepsy pills (3594, 3600-1, 468 B). But she also conceded that during the seven month period she had discussed the subject with the prosecutor, she had, with but one post-trial equivocation, invariably denied altogether the occurrence of such a call and had, on one occasion, done so in Dagmar's presence (3530-3, 3535-8, 3541).

On the other hand, the trial assistant, Vincent J. Dermody, testified that when he first spoke to Dagmar she told of receiving a phone call from Mrs. Lazarus sometime in the latter part of September or early October and placed the time by inquiring "could it have been around 8 or 9 o'clock?" (3344-5, 3352). In an effort to fix the hour of the call more precisely, Dagmar recounted the events of that day in some detail, finally concluding that it occurred "sometime after seven o'clock possibly between six and seven, but I'm not sure. * * * All I know is that it was dark out, and when I entered the building the dry cleaning

man was getting ready to close his store'' (3345-9). She never retracted this account of her activities or claimed confusion (3360).

On a second visit to the District Attorney's Office Dagmar confronted Gail Weiner Tracy with her story of receiving a phone call at her house ''sometime after or between 6:00 p.m. and 7:00 p.m. (3357). Before she could finish, Mrs. Tracy called her a liar, saying she never received a call on her phone from Mrs. Lazarus at any time (3357). Mrs. Tracy never retracted this denial (3384).

On a third visit to his office, Dagmar again assured Mr. Dermody that the late September or early October call came between 6:00 pm and 7:00 p.m., ''or even possibly later'' (3360-1, 3499).

Detective Leman testified to several conversations with Dagmar, including one at her house (2298-9). He was told that the call she had received from Mrs. Lazarus occurred ''Maybe it was eight o'clock or nine o'clock'' and, ''after six and close to seven p.m.'' (2315-16, 2372, 2431).

After hearing all the witnesses, the trial court found Dagmar Generazio a completely untruthful witness and rejected her testimony that she had received a call at any time. With customary thoroughness, the court, describing the basis for this conclusion, wrote:

> ''Having seen and heard this witness [Dagmar Finch Generazio], I reject her testimony as totally unworthy of belief. While under oath at the hearing she strained with tireless effort to avoid telling the truth, whether the examination covered her recorded criminal past, the date of her marriage, the frequency

which the police telephoned her, or the reaction of Gail Weiner Tracy * * * upon a certain confrontation. The foregoing are all measurable standards, but of no greater import than the impression this witness created when set against less tangible marks. I find that she never told the prosecution of receiving a call on any afternoon. I further find that insofar as this witness' credibility is concerned, her story that she received any call from Mrs. Lazarus on the day, or month, of the killing does not warrant belief.

* * *

"Sergeant Russell Generazio, the estranged husband of Dagmar, testified to certain conversations had with representatives of the prosecution which corroborated his wife's story in most of the material aspects. The witness, who frankly admitted a consuming interest in winning anew his wife's affections, continuously expressed by word and deed his desire to ingratiate himself in her favor during the several days the two were in court. Viewed most charitably, his testimony does not realize the level of probity required" (3907-8).

* * *

"Her [Gail Weiner Tracy] testimony is that although she insisted without variation for months on end that no call had come to her apartment despite the most persistent efforts of the prosecutor, a two hour conference with the defendant's attorney brought forth the vivid recollection and admission of the hour and date of such a call. Subsequently on the very day she allegedly offered this assistance to the defendant, she called the District Attorney's office and advised that the defense had tried to buy her off since her observations were harmful to their cause. Thereafter she left her home for some days in an effort to avoid process. But without detailing the unwholesome taste

> Mrs. Tracy's narration leaves concerning all of the circumstances immediately preceding her appearance in court, I find that on the basis of her entire testimony she is not worthy of belief. Indeed, one glaring and unexplained contradiction is her statement in the question and answer that she fixed the time of the call as shortly after 3 P. M. because she had just taken her Dilantin and Phelantin pills, and her statement at the hearing that she took these pills only at 9 A. M. and 9 P. M. At 3 P. M. she used the Dilantin pill alone—her unvarying practice for thirteen years. If she had just taken the two pills she claims in the question and answer, the hour was obviously no where near 3 P. M. In any event, the fact that she could pinpoint the date and hour of a phone call 18 months ago with such accuracy, but remains unable to fix the day of a meeting with an attorney for the defendant the very week of the hearing indicates the want of credibility attaching to her" (3912-13).

The court clearly had power to dispose of this issue on the sole ground that witnesses proffered lacked sufficient credibility to warrant a new trial. Those courts which have discussed this subject, have consistently affirmed that

> "the trial judge who approaches the question of the probable effect of the new evidence upon the result, in the event of a new trial, should be vested with a broad discretion in considering matters of credibility as well as of materiality. Stringent or artificial limitations upon the exercise of the discretionary power of the trial judge to grant new trials could only subvert the purpose of the remedy." *Jones* v. *United States,* 279 F. 2d 433, 463 (4th Cir., 1960).

See also, *United States* v. *Lewis,* 338 F. 2d 137 (6th Cir., 1964), cert. den. 33 L. W. 3347 #980; *People* v. *Shea,* 16

Misc. 111 (1896); *People* v. *Dunn,* 194 Misc. 442 (1948); *People* v. *Norman,* 1 Cal. Rept. 699 (2nd Dist., 1960).

The lengthy post-trial record offering support, in depth, for Judge Culkin's findings concerning credibility, his decision should not be disturbed. The confirmations of these findings by the Appellate Division [Dagmar was "clearly not * * * a source that a jury would be expected to credit" (3967)], and the Court of Appeals (Appendix to Jurisdictional Statement, pp. 11a-12a), fixes them irrevocably. Speaking for the Supreme Court in *United States* v. *Johnson,* 327 U. S. 106, 111-12 (1946), Mr. Justice BLACK observed:

> "But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact [cits. om.]. While this appellate court might intervene when the findings of fact are wholly unsupported by the record, [cits. om.], it should never do so where it does not clearly appear that the findings are not supported by any evidence".
>
> * * *
>
> "While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial" (327 U. S. at p. 113).

Beyond these considerations, it should be observed that Dagmar's story does not relate directly to the issue of the appellant's guilt or innocence. At most, it pricks Mrs. Lazarus' credibility on a peripheral issue: her denial that she telephoned Dagmar. Therefore, it is not grounds for a new trial. In an opinion that has remained unimpeached for over half a century, the New York Court of Appeals wrote, in *People* v. *Eng Hing and Lee Dock,* 212 N. Y. 373, 386 (1914):

> "The obvious purpose of the motion was to discredit the testimony of the two women * * *. This court has said (per Martin, J.) that a motion for a new trial should not be granted if the evidence is 'merely impeaching or contradicting the former evidence' (cits. om.)".
>
> * * *
>
> "The whole proceeding, from beginning to end, was simply an effort to impeach the witnesses Florence Wong and Grace Mack; and that, as we have seen, is not a sufficient reason for granting a new trial on the ground of newly discovered evidence, even where the impeachment is successful" [212 N. Y. at pp. 392-3].

See also *People* v. *Becker,* 215 N. Y. 126 (1915); *United States* v. *Hiss,* 107 F. Supp. 128, 136 (S. D. N. Y., 1952), aff'd 201 F. 2d 372 (2d Cir., 1953), *cert. den. sub nom. Hiss* v. *United States,* 345 U. S. 942 (1953); *United States* v. *Switzer,* 252 F. 2d 139, 146 (2d Cir., 1958) (opinion by CLARK, J.).

In an effort to prove that Dagmar Generazio's story is exculpatory, appellant now claims that he was the victim of an "extortion and blackmail scheme * * * obviously plotted" by Mrs. Lazarus (180B; Jurisdictional State-

ment, p. 11). His failure to tender this defense earlier apparently has its dual source in his being "not overly concerned as the date of his trial approached" and counsel's advice that he need not testify (179B; A. Br. to App. Div., p. 205). Be that as it may, new trials will not be granted solely to permit new defenses.

Moreover, even if Mrs. Lazarus did telephone Dagmar for a car to move a box, this would in no reasonable way tend to disprove appellant's murderous deed. The outlandish "blackmail" theory suggested is not even supported, much less proved by the testimony offered. Such a telephone call does not eradicate the appellant's complicity in the murder, nor does it transform Mrs. Lazarus into the engineer of an extortion plot directed at him.

If the call came at 6:00 p.m., the earliest hour at which Dagmar's equivocal pre-trial account ever fixed it, it would be completely consistent with the prosecution's theory, though contradicting Mrs. Lazarus when she testified at trial to the effect that she had not telephoned Dagmar (1346). If the call came shortly after 3:00 p.m., the present claim, at the most it might also tend to inculpate her as having had advance knowledge of the murder plan. But no reasonable inference from this fact exonerates the appellant.

Moreover, without condoning perjury by Mrs. Lazarus, assuming *pro arguendo* that perjury it was, it related to an issue totally apart from guilt or innocence. And as the trial court observed, "suffice it to say that her character and reputation never were an issue" (3910). The prosecu-

tion did not offer her as virtue incarnate, but rather as an eyewitness chosen by the defendant because she dwelt in "the depths that the defendant stooped to" (2120). The summation commended her not because she was beyond lying, but because she brought forth certain vital post-crime evidence. Indeed, little could be added to the clear and forceful manner in which the defense, throughout the trial, painted her untruthful instincts. It is apparent that the jury accepted material portions of her recital because they had the ring of truth, not because they had any illusions concerning the impeachability of her veracity.

Further, try though he may, there is no escaping the fact that the appellant knew, while the trial was yet in progress, that a girl named Dagmar Finch had advised the district attorney that on October 10, 1963, Mrs. Lazarus had telephoned her in an attempt to borrow a car (3018-19). Aside from one passing attempt by a private investigator, Mr. Whelan, to obtain her phone number from Detective Leman ["I didn't expect he would give it to me. In fact, he says, 'I'm not at liberty to give it to you' " (2930)], not one member of the defense ever indicated to the prosecution that any difficulty existed in locating her. The last the trial assistant knew was that Detective Leman had directed Mr. Whelan to Dagmar's mother in Baltimore, and that defense counsel referred to her during the cross-examination of Miss Boxer (765-6). Thus, the present case is clearly distinct from the many cases defendant cites in support of his "affirmative disclosure" theory (Jurisdictional Statement, pp. 36, 38-9). In each of them the defense was, at trial, entirely unaware of the evidence it later submitted.

Appellant now belittles his failure to ask for Dagmar's address (Jurisdictional Statement, p. 39), but in light of his knowledge of her existence and her story that omission alone is fatal to his cause. Under these circumstances the requisite of diligence is statutory and immutable. See New York Code of Criminal Procedure §465 (7); *United States* v. *Costello,* 255 F. 2d 876, 880-1 (2d Cir., 1958); *United States* v. *Lombardozzi,* 343 F. 2d 127 (2d Cir., 1965). A special exception cannot be made in this case.

Failing to show a deprivation of material exculpatory evidence, the appellant now attempts to transform his contention into a claim of prosecutorial connivance in the use of perjury. The significance of this rests in the case law, for unlike the standards to be met before a second trial will be held on the ground of newly discovered evidence, the appellant, in order to obtain another trial, need only show that the District Attorney failed to correct testimony he knew to be perjured. This follows even where the sole point goes to the credibility of that witness. Notwithstanding appellant's analysis to the contrary (Jurisdictional Statement, p. 40), New York's decisional law, including the case at bar, is founded firmly upon these principles. The record, however, does not support the charge that the prosecutor engaged in any such wrongdoing. Indeed, the perjury claimed is non-existent.

The appellant specifically argues that the failure of the prosecutor to "correct" that testimony of Detective Leman and Mrs. Lazarus, which omitted Dagmar's name when listing those present at the time of the second recantation, deprived him of a fair trial (Jurisdictional State-

ment, pp. 17, 40). Appellant adds that this error was compounded because the prosecutor failed to rectify the erroneous explanations given by these two witnesses as to the cause of Mrs. Lazarus' second recantation, and was, presumably, further aggravated when he concealed the details of the confrontation between the two women. As noted above, the record will not support this indictment against the trial assistant.

At the trial, Mrs. Lazarus testified that on September 28, 1964, she saw Mr. Dermody; Detectives Lyons and Leman were also present (1392-3). She recalled no one else there (1393). Upon inquiry as to why she had recanted on that date, Mrs. Lazarus responded, "For the same reason" as in June ["I truly felt sorry for the defendant and felt that my testimony would be detrimental" (1428)]; "The idea of coming here and saying these things that might hurt this man was against all my principles" (1429).

At trial, Detective Leman also omitted Dagmar's name from the list of those present at the second recantation (1635-7). When the moment arrived where Mrs. Lazarus directed him to leave the room, Detective Leman told the jury, "she accused me of questioning friends of hers, and being a—she accused me of being a Gestapo agent" (1666).

At the post-trial hearing, Mr. Dermody testified that when the two women confronted each other, Mrs. Lazarus "started to yell, and she accused Detective Leman of getting people to say things that weren't true about her" (3362-3). Detective Leman then took Dagmar out of the

room and at about the same time Mrs. Lazarus spoke by telephone with her lawyer (3363, 3497). Mrs. Lazarus

"blamed Detective Leman for cooking these things up and having these witnesses tell these stories" (3501).

"She was mad at Leman. She accused Leman of trumping up this story, getting Dagmar to trump up this story about her; and out of spite to Leman, she told us she wouldn't testify and said that Fein never said it" (3507).

* * *

"Q. According to your testimony, Mr. Dermody, when Dagmar confronted Gloria and gave her statement that you say she gave to you, it was after that that you say that Gloria changed her mind and said she had lied about what she told you?

"A. But sometime after. This was not a spontaneous exclamation on her part.

"Q. Sometime the same day?

"A. That same day, but later on.

"Q. And later on—how long? It was while Dagmar was still in the room, was it not, sir?

"A. No, it was not.

"Q. It was afterwards?

"A. Yes. Dagmar, as far as I can—certainly she wasn't in the room.

"Q. All right.

"A. Well, I can't swear that Dagmar had already left the building" (3508-9).

At the post-trial hearing Detective Leman testified, in response to specific questioning, that on September 28, Mrs. Lazarus "just exploded" upon hearing Dagmar's account of the telephone call (2326). As he recollected, Dag-

mar left the room before Mrs. Lazarus (2328). He also departed, although he does not indicate when, and was not present when Mrs. Lazarus actually changed her story (2328-9).

Although the entire sequence of events is not clearly set forth in the record, the evidence is undisputed that Mrs. Lazarus "exploded" upon being confronted by Dagmar's story, but did not recant until sometime later. When she did recant Dagmar was not present, nor was Detective Leman. Indeed, he seems to have escorted Dagmar out, returned, and then been directed out later on at Mrs. Lazarus' insistence. If this is so, then the police officer was accurate in omitting Dagmar's name from aming those present at that time (1638). She was not there. Mr. Dermody's description that "She was mad at Leman," "accused Leman of trumping up this story, getting Dagmar to trump up this story * * * out of spite to Leman she told us she wouldn't testify," in no way conflicts with the detective's account at trial; "she accused me of questioning friends of hers * * * of being a Gestapo agent."* The post-trial examination was simply gone into a greater length and with greater specificity.

The brief examination covering the persons present with Mrs. Lazarus when she recanted lacked the coverage with which appellant would now cloak it. As the Appellate Division succinctly concluded, "who was present at the interview was not emphasized and received only cursory attention" (3969). The specific questions certainly

* If this prosecution witness was conspiring to conceal by committing perjury, certainly he would not have volunteered this provocative item to defense counsel at trial.

did not cover all the people Mrs. Lazarus met during her entire visit on September 28th. And yet, without such a broad scope, it is difficult to see how she, or the trial assistant, could be aware that the answer given might be construed as inaccurate at a later date. Its very ambiguity left it to the listener to interpret. Thus, while the defendant may presently insist that the question covered only one point of concern, the contrary can just as reasonably be argued. Indeed, Mrs. Lazarus' omission of Dagmar's name from among those present at the moment of recantation was an accurate account. Dagmar was not there. (See also opinion of App. Div., 3968.)

Appellant now urges that Detective Leman must have been testifying about the earlier meeting when Dagmar was present and not the moment of recantation, because he was not there at that later hour (Jurisdictional Statement, p. 19). But the premise of appellant's argument exposes the invalidity of his conclusion. When Detective Leman later learned of Mrs. Lazarus' change of story, he obviously surmised who was still present. Certainly he knew that Dagmar was not; he had previously escorted her out. Thus, he spoke with accuracy in listing those present at the time of recantation.

The record repeatedly demonstrates that the trial assistant was continuously on guard that the events should be fully and accurately presented to the jury. In an unusual aside, Judge KEATING, speaking for the Court, lauded the prosecutor for his "strong sense of fairness" (Jurisdictional Statement, p. 10a). At least twice during Mrs. Lazarus' testimony he called the court's, and the appellant's

attention to inaccuracies, once in connection with her denial of having seen certain grand jury minutes (1414-15), and again in relation to the disposition of criminal charges she yet faced (1421-3). Any doubt existing as to what interpretation attaches to the appellant's non-specific question should clearly be resolved in favor of this prosecutor.

Why Mrs. Lazarus temporarily altered her account is plainly not subject to objective analysis alone. Detective Leman's interpretation of her act differed from Mrs. Lazarus' explanation. Perhaps both were correct. Of paramount importance is that each explanation was before the jury, as was, of course, the act of recantation itself. But surely it cannot be held against the prosecutor because he failed to tender his subjective understanding of why Mrs. Lazarus did something, an understanding which, incidentally, coincided with that already offered by Detective Leman.

While the cause for Mrs. Lazarus' recantation appeared twofold at trial, the record will not support appellant's present attribution of motive for recantation to the confrontation with Dagmar (Jurisdictional Statement, pp. 11-12, 17, 39). To conclude so is sheer speculation. The argument he builds therefrom—that it was error not to give the details of that meeting—must fall, as it is without foundation.

Lastly, the defendant seems to contend, although not clearly arguing it, that Mrs. Lazarus committed perjury when she denied making more than one telephone call for a car, and that it was error for the prosecutor not to point this out.

If Mrs. Lazarus lied about either of Dagmar's stories (and there is no reason to believe that she was ever confronted with the tale of the 3:00 p.m. call), it still would not amount to a deprivation of due process. Of course, the prosecutor's knowing use of perjured testimony either through subornation or by allowing known perjured testimony to remain uncontroverted is a deprivation of constitutional rights [*Wilde* v. *Wyoming*, 362 U. S. 607 (1960); *Napue* v. *Illinois*, 360 U. S. 264 (1959); *Alcorta* v. *Texas*, 355 U. S. 28 (1957); *Pyle* v. *Kansas*, 317 U. S. 213 (1942)]. However, the courts have fairly consistently held that knowledge of the perjury by the prosecution is essential in order to effect a deprivation of due process [*People* v. *Robertson*, 12 N. Y. 2d 355 (1963); *People* v. *Fanning*, 300 N. Y. 593 (1949); *Mooney* v. *Holohan*, 294 U. S. 103 (1935); *United States* v. *Jakalski*, 237 F. 2d 503 (7th Cir., 1956), *cert. denied* 353 U. S. 939 (1957); *Wild* v. *Oklahoma*, 187 F. 2d 400 (10th Cir., 1951); *United States* v. *Kaplan*, 101 F. Supp. 7 (S. D. N. Y., 1951); *Tilghman* v. *Hunter*, 167 F. 2d 661 (10th Cir., 1948); *Wagner* v. *Hunter*, 161 F. 2d 601 (10th Cir., 1947); *Casebeer* v. *Hudspeth*, 121 F. 2d 914 (10th Cir., 1941), *cert. denied* 316 U. S. 683 (1941)]. In *Jakalski*, the court stated:

> "The introduction of perjured testimony without more does not violate the constitutional rights of the accused. It is the knowing and intentional use of such testimony by the prosecuting authorities that is a denial of due process of law" (237 F. 2d at pp. 504-5).

Far from being a "knowing and intentional use" of perjury, the prosecutor had found an eyewitness who refuted Dagmar's account and thereby corroborated Mrs. Lazarus'.

In the unusual cases which have granted relief despite the lack of prosecutorial knowledge, the conviction could not have possibly been sustained without the perjury [*Jones* v. *Kentucky*, 97 F. 2d 335 (6th Cir., 1938)], or the perjurors directly contradicted the defendant's testimony on a material issue [*Curran* v. *Delaware*, 259 F. 2d 707 (3d Cir., 1958)]. Neither exception applies here.

Moreover, it may be noted that the *Curran* decision was predicated upon an erroneous reading of *Pyle* v. *Kansas* [317 U. S. 213 (1942)]. In *Curran* the court dispensed with the necessity of prosecutorial knowledge that the testimony was perjured by specifically citing *Pyle* as a case where such knowledge was not required [at p. 713]. Nevertheless, the United States Supreme Court in *Pyle* accepted as true the allegation that "the Kansas prosecuting authorities obtained his conviction by the presentation of testimony known to be perjured," (at pp. 214, 216), and remanded that cause for a hearing to determine the verity of the allegations.

Finally, while it is incumbent for the prosecutor to keep the defense fully advised in such matters as pertain to perjury, had the prosecutor known Mrs. Lazarus to be "perjuring" herself, his disclosure in the case at bar would have been mere form, for the defense already knew of Dagmar's account. See *Commonwealth* v. *Heffernan*, 213 N. E. 2d 399, 404 (1966), *cert. denied sub nom. Heffernan* v. *Massachusetts*, —— U. S. ——, 34 U. S. L. W. 3405 (1966); *Green* v. *United States*, 158 F. Supp. 804, 809 (D. Mass 1958) (opinion by WYZANSKI, J.); aff'd 256 F. 2d 483 (1st Cir. 1958).

(7) There was no prosecutorial suppression of Sandar Ede's "evidence."

The appellant also offers Sanda Ede as the basis for a new trial. She was the prostitute who took messages for her friend Mrs. Lazarus at the latter's apartment and was present when the appellant called seeking help in the late afternoon of October 10, 1963 (1133-34). After Mrs. Lazarus had responded to that call and departed, Miss Boxer arrived at Mrs. Lazarus' building, pursuant with their prearranged rendezvous (705-6). Upon conversing on the lobby intercom with Miss Ede, Miss Boxer went to the "Weissman" apartment at 406 East 63rd Street (708-9). There she helped the appellant attempt to conceal the murder.

Near the conclusion of the People's case the prosecutor observed that when Miss Ede had been questioned at the District Attorney's Office, she

> "claimed to have had no recollection of the events that allegedly transpired on October the 10th.
>
> "It is for that reason that the People did not call her as a witness. However, I want to furnish counsel with the name, full name of this person, and her address for their benefit, so that they can do whatever they want with it.
>
> "The name of the woman is Sandra Ede—E-d-e. She resides at 2575 Palisade Avenue, Riverdale, New York" (1747).

The appellant contends that this statement was misleading, that Miss Ede had in fact given the prosecutor a different, and exculpatory, account indicating that although

she had no recollection about October 10, 1963, she never gave any message over the intercom. Even if true, this collateral point is here magnified out of all proportion to its significance in the case.

Eschewing restraint, and recorded facts, the appellant in moving for a new trial also charged that the prosecution met "repeatedly" with Miss Ede and "pressed her * * * to lie for them" (31 B-32 B). Unsuccessful, the prosecution then transcribed a statement, and "The police and prosecutor hounded her until her health broke and she was institutionalized" (32 B). Appellant concluded that the "ploy" of giving the defense her name and address was "doubly misleading"; the substance of her story was misrepresented and "previous defense counsel could not even contact Sandra, at the time, because she was under psychiatric care in a hospital" (33 B).

Miss Ede herself refutes most of these vicious charges, and all of the credible, material, and relevant evidence establishes both the lack of merit to her present story and the absolute correctness of the trial assistant's behavior.

After hearing Miss Ede, and Messrs. Leman, Dermody and Herman (Chief of the District Attorney's Homicide Bureau who interviewed Miss Ede prior to trial), the trial court wrote:

> "In court she [Miss Ede] indicated, although with some ambiguity, that it was her practice not to speak to anyone over the intercom, and it is clearly this general procedure that she refers to in the questions and answers. But it is equally certain that this witness, who was exceptionally anxious not to be a witness—

either at the trial or at the hearing—consistently advised all of the representatives of the prosecution repeatedly she could not recollect "one way or the other" the events of October 10, 1963, or any other day during that period, with respect to her participation in a conversation over the intercom with Geri Boxer. Faced with a witness of now proven instability whom he had every reason to believe was withholding information helpful to his case, the prosecutor acted appropriately when he advised the defense of her name and address. He was under no obligation to volunteer her entire story and defendant's prayer for that proposition is rejected as unprecedented. It is also considered significant that the defendant was not only aware of Miss Ede, but interrogated Miss Boxer at the trial as to whether Miss Ede did not have a different recollection than Miss Boxer's. Miss Ede herself supports Miss Boxer's answer which was 'she said she didn't remember.' It is further certain that the statements by defendant's attorney concerning the inaccessibility of Miss Ede, at the time her name was tendered by Mr. Dermody at trial, are inaccurate. She was available as a witness past the time the defense rested, and the conclusion that the defense consciously rejected the idea of speaking with her is irresistible and is supported by their refusal to obtain an affidavit from Mr. Kleinman on this subject, in spite of this court's express request. Similarly, it is plain that the defendant's charges that the prosecution harrassed Miss Ede until she was driven to a mental institution is without one scintilla of proof. Miss Ede denied ever making such a charge" (3906-7).

On appeal, the gravamen of appellant's contention revolves about Miss Ede's present claim that she never gave messages over the intercom. Mr. Dermody flatly denied

ever being so advised (3375), as did Detective Leman (2411, 2422-3) and Mr. Herman (3288).

In arguing that the Appellate Division expressly "found" that Miss Ede had told the prosecution of not passing on the message, appellant misinterprets that opinion (Jurisdictional Statement, p. 21). The only judicial "findings" in the record are those of Judge Culkin, quoted in part on the preceding two pages. When the appellate court writes, "On the motion for a new trial it was established that," the word "motion" must be defined as limited to the pre-hearing papers. Twice elsewhere in the Appellate Division opinion, the word "motion" is used in this narrower, but nonetheless proper, sense (See footnotes at 3958, 3963.) Where there is sufficient in the record to support the trial court's findings, it cannot be assumed, as appellant does, that they were overruled *sub silento*. The main thrust of Mr. Justice Steuer's opinion is that, on the basis of the affidavits presented, no hearing was warranted on the Ede matter. Thus, the court writes, "whether or not" the claimed matter was disclosed by the prosecutor, the defense already knew about her and therefore the "contention of concealment was not proved" (3963). This conclusion, incidentally, is the same one the prosecution reached prior to the hearing (488B). In adopting the broader definition of the word "motion" appellant is left with a structural contradiction which, in the state courts, he could only explain away as "egregious error" (A. brief to N.Y. Ct. of Ap., p. 36); in limiting the definition the inherent logic of the opinion follows throughout. Plainly the narrower interpretation is the one to be selected, as was done by the New

York Court of Appeals (Appendix to Jurisdictional Statement, p. 4a).

The trial assistant was faced with a witness who had every reason to know whether or not she had a role in the singular whirl of events which followed the appellant's request for help, but who steadfastly equivocated. She would neither affirm nor deny, repeating endlessly, "I don't remember."

In an effort to ascertain the truth, the prosecutor confronted Miss Ede with Miss Boxer's account. As Miss Ede herself recounted, her response to Miss Boxer was, "I don't remember any of these things, you know, but I don't want to call you a liar * * * I don't know" (3201). [See also Miss Boxer's (782-3) and Mr. Dermody's accounts (3378) of this confrontation.]

The trial assistant also ascertained that a telephone had been installed in Miss Ede's Riverdale apartment on October 10, 1963, and so advised her. Despite this fixed incident, Miss Ede still could shed no light. She asserted the cliché that she could not be in two places at the same time, but refused to deny, or admit, that she conveyed a message for Mrs. Lazarus on that date (3164-5).

Miss Ede was confronted with Mrs. Lazarus. Still she "could not remember one way or the other" (2402).

In additiion, as she twice admitted, Dagmar also placed Miss Ede in Mrs. Lazarus' apartment before 4:00 p.m. on the afternoon in question (2662, 2669). But Miss Ede still claimed insufficient memory. It should never be for-

gotten that, throughout, the trial assistant was confronted with a witness whose instability was apparent, and ultimately confirmed medically.

In the light of these circumstances, choosing not to call Miss Ede to the stand cannot be faulted. No higher standard could be demanded than that exhibited in the investigation of her story. She had nothing to add to the case. The offer of her name and address, though perhaps unnecessary in view of the appellant's knowledge of Miss Ede and the details of her conversations in the District Attorney's Office (780, 782-4, 786, 808), was fairly and timely made.

Moreover, the credible evidence shows that the appellant was not misled by the prosecutor's statement. As pointed out by both the Appellate Division and the Court of Appeals, he knew about Miss Ede, and questioned Miss Boxer about her before and during the trial (3963, Appendix to Jurisdictional Statement, p. 5a). He is precluded now from offering her as a witness when he rejected the same opportunity at trial.

(8) There was no prosecutorial suppression of the "evidence" offered by Mrs. McNair and Mrs. Bennett.

At the hearing on his motion, the appellant produced two witnesses, residents of the East 63rd Street building where the murder occurred. These women, Mrs. McNair and Mrs. Bennett, testified that they recalled hearing four gunshots coming from a direction opposite from the appellant's apartment (2827-9, 3071-3, 3091-2). On the basis of this testimony and the failure of the People to volunteer

them as witnesses at trial, the appellant claims he is entitled to a new trial.

This claim was properly rejected by the courts below. First, the defense not only knew of the existence of the witnesses, but had unusually good access to them since one of the women, Mrs. Bennett, was a social acquaintance of one of the appellant's attorneys, Mr. Kaslow (2837, 2846, 2888-90, 2894, 2959, 2970, 2973-4, 2977-8, 2981, 2984, 2989). Second, the account given by the witnesses to the trial prosecutor, far from being the "material exculpatory evidence" now alleged, was in fact strongly inculpatory and wholly consistent with the People's theory of the case (2344, 2387-8, 2395-8, 3365-7, 3370). The only evidence found credible is that the witnesses repeatedly told Mr. Dermody and detectives that they heard shots coming from above them and toward the front of the building, the direction of the defendant's flat (*ibid*). The witnesses also told the prosecutor that they had disclosed to the defense their recollection as given to the prosecutor (3368, 3371, 3414). Finally, the credibility of these witnesses and the accuracy of their perception and recollection was seriously undermined. Their ability to identify the sounds they heard as gunshots, their changing accounts, and their plausibility on other points all led the trial court to conclude that they are "completely confused." Stating the reasons for this conclusion fully, the court wrote:

> "The defendant offered the testimony of mother and daughter, neighbors of his, Mrs. McNair and Mrs. Bennett, as proof that the shots came from a direction other than the defendant's 63rd Street apartment. Taking their credible testimony in the most favorable

light, each testified that some time in late September or early October 1963, they heard four to six loud noises which came through their living room window (an exposure which faced the rear of the building as opposed to the defendant's dwelling which was in front and two floors higher) late in the afternoon. I find no basis for believing that they recognized the sounds as gunshots, partly because Mrs. Bennett long ago denied hearing shots when questioned by the defendant's first attorney of record, Mr. Kassow, and partly because of their lack of expertise. Mrs. Bennett's recollection that she only discussed having seen a large steamer trunk in the lobby of the building during the same period—but not the 'shots' because of the trial assistant's request that she not discuss it with anyone, is completely inconsistent with her demeanor at the hearing. This voluble witness was simply incapable of restricting her desire to talk. Coupling the testimony of these witnesses with the information they gave to Mr. Dermody and Detective Leman (that the shots came from up above and towards the front of the building—and that Mr. Kassow had been so advised), the only reasonable conclusion is that they are completely confused. They misdated their conversation with Detective Leman by several months, failed to remember their description of the trunk from one week to the next, and as noted above inaccurately recounted the nature of the information they passed on to Mr. Kassow. That they may have told the prosecutor an entirely different story than what they presently recollect is so reasonable that it is the only probable explanation. The prosecutor, having been advised by the witnesses that the defendant's attorney had already been informed of matter which would tend to inculpate the defendant, could not be expected to come forward with the pointless task of repeating that information" (3904-05).

Appellant's assertion that the Appellate Division "found" to the contrary (Jurisdictional Statement, p. 22), once again misinterprets the opinion of that court (see also p. 43, *supra*). While defense claims are set forth by the Appellate Division in introduction to the ensuing legal discussion, this brief summary of the appellant's pre-hearing contentions cannot reasonably be construed as an overruling of Judge Culkin's detailed findings. If anything, in twice expressing difficulty in believing these women reliable (3964, 3967), the appellate court seems to be in accord with the trial judge. And so concurred the Court of Appeals (Appendix to Jurisdictional Statement, p. 5a).

Once the credibility of Mrs. McNair and Mrs. Bennett have been found wanting—and it is a preposterous story they tell—the refusal of the police and trial assistant to call them as witnesses is beyond fault. Indeed, the decision is repeated by the defense. It is conceded that the appellant knew that these women were witnesss to the very important presence of the trunk in the building. One can only surmise what appraisal of their yarn was made when the attorney of record conferred with Messrs. Blinder and Kleinman. The result of that colloquy is a known fact. The women were never even sought for questioning.

In sum, great violence would be done to the concepts of newly discovered evidence and prosecutorial suppression if a situation such as this one were deemed cognizable thereunder. The defense decision not to pursue known witnesses is a binding one, for the sound order of criminal trials requires diligence on the part of defense at their first opportunity [N. Y. Code Crim. Proc. §465(7)] and not repeated trials to correct possible omissions or errors of judgment.

Conclusion

The appeal should be dismissed because not taken in conformity to the requirements of 28 U. S. C. §1257(2) and because no substantial federal question has been presented, or, in the alternative, the judgment should be affirmed as fully consistent with controlling principles of constitutional law.

Respectfully submitted,

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